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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 1199 149

O. C. LEE, Individually, and J. C. LITSEY, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., - - - - - - - - - Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Et Al., - - - - - Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

BLAKEY HELM,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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No. 1120

O. C. Lee, Individually, and J. C. Litsey, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., - *Petitioners,*

v.

Louisville and Nashville Railroad Company, Et Al., - - - - - *Respondents.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Petitioners, and those whom they represent, are long time mechanical employees of the Louisville and Nashville Railroad Company. Some of them are colored; some are white. Some belong to unions; some do not. All of them work at some specific crafts employed by the Railroad Company, with these crafts represented by designated International Unions.

These unions, as bargaining agents, have negotiated collective bargaining agreements, one of the agreements covering the skilled employees working in the crafts of machinists, electricians and sheetmetal work-

ers and the other agreement covering unskilled employees in various kinds of labor. The latest agreements were negotiated in 1943 and 1942 with some amendments since these contracts were adopted. There have been no amendments since 1957 or 1943 affecting the seniority rights of these employees.

Copies of these contracts are filed as "Exhibit A" and "Exhibit B" with the Complaint in Equity in this action. In the Appendix to the Petition for Writ of Certiorari in this action, the provisions of said contracts relating to seniority rating in specific shops in Louisville, Kentucky, are quoted. The quoted sections of the bargaining agreements provide for separate seniority rosters for the four classes of mechanical employees mentioned, at the points designated in the agreements as "South Louisville Shops" and "South Louisville Roundhouse", and for some crafts at other locations.

The common interest between the petitioners and the rest of the 66 employees whom they represent, lies in the fact that they were all listed by the Louisville and Nashville Railroad Company on the seniority rosters for the area lying West of a division fence through the South Louisville yards, this area having been designated since about 1901 as the South Louisville Roundhouse. This is the same area designated in the two bargaining contracts *supra*.

This action was filed for a declaration of rights between the petitioners and those whom they represent on the one hand, and the Railroad Company, and the union bargaining agents on the other hand. The Com-

plaint states that it arises under the provisions of the Railway Labor Act of 1934 (R. 15). The bargaining agreements were negotiated pursuant to said Act, but the points mentioned and the seniority rights designated therein, have existed from dates long prior to the existence of the present bargaining agreements.

Since 1934 the Railway Labor Act has included provisions for the National Railroad Adjustment Board, the composition of the Board being entirely of representatives of the carriers and representatives of the unions, in equal numbers. Presumably the members of these Boards have not been experienced as judges, or as lawyers, or particularly educated for the determination of legal rights, other than from practical experience in railroad operation. Nevertheless the carriers have, ever since 1934, attempted to claim exclusive jurisdiction for the Adjustment Board, of any and all controversies arising between the carriers and either the unions or individual employees in regard to rules, working conditions and rates of pay. This Court has had a steady stream of applications to it for determination of the jurisdiction of the National Railroad Adjustment Board and the limits upon its authority. Even since this particular action was finally decided by the Kentucky Court of Appeals on February 22, 1963, this Court has had presented and made further specific decisions relating to the jurisdiction of that Board.

As in many of these other cases, the Railroad Company has based its principal defense purely on the claim that this action is, by the Railway Labor Act,

placed exclusively within the jurisdiction of the National Railroad Adjustment Board. We believe that the late decisions by this Court have helped to clarify the misunderstanding and confusion caused by the attempt of the carriers, in almost every case, to claim jurisdiction within that Board.

Petitioners are asking for a declaration of rights in regard to violations of specific written agreements, and adjudication prospectively of the rights of these 66 employees as of February 18, 1957, and of each day since, under those contracts.

Petitioners proposed dovetailing rosters as a means of according fair treatment to employees on rosters of both geographical points specified, even though this idea was not in the agreements. But as to provisions of the contracts, giving to the employees, property rights by contract, petitioners insist that they have a right to their "day in court". This insistence upon an actual hearing before a judicial tribunal is in accord with the principles consistently recognized and enforced by this Court.

CONFUSION CREATED BY CARRIER'S CONTENTIONS.

The Complaint in Equity filed in this action (R. 12-35) and the Amended Complaint in Equity (R. 54-65) clearly state the facts upon which the petitioners and those whom they represent ask for a declaration of rights.

The Complaint quotes the skilled employees agreement as providing in Rule 29(b) that seniority of em-

ployees in the crafts covered by the agreement "shall be confined to the point employed". The Complaint states that that section then specifies the points for the various crafts, and that in Rule 29(c) it provides for revision of seniority rosters in January of each year. The Complaint also quotes from Rule 26 as to reduction in forces with Rule 26(g) providing that "employees will be restored to service in accordance with their seniority." Similar provisions in the agreement as to unskilled labor are quoted, with Rule 14(c) providing that "men will be returned to service in the order of their seniority."

The Complaint then alleges that on February 4, 1957 the Master Mechanic at South Louisville posted bulletins that, effective at close of work of the third shift, all mechanical operations of the South Louisville Roundhouse would be discontinued, and all men listed on the Roundhouse rosters would be cut off. This Complaint then alleges that there was in fact no force reduction, and the jobs in the area known up to February 18, 1957 as South Louisville Roundhouse were continued with the jobs allotted to employees on other seniority rosters. *These jobs have ever since been filled from other rosters.*

On investigation, it turned out that the bargaining representatives had been notified of this proposed change in use of personnel but had consented. *However, no change* was made in the written bargaining agreements. The employees listed on the Roundhouse rosters were not consulted or notified of the proposed

changes. They learned of this, by the cold February 4th announcements of a supposed reduction in forces.

By the Amended Complaint, petitioners stated that some of them were members of the unions involved and some were not. Plats were filed with it showing the location of the division fence and the two separate shops, west and east of this fence, respectively. It further stated there was actually no reduction in forces, only a change in name of the area designated as the "South Louisville Roundhouse" point, to an extended part of the South Louisville Shops.

The Amended Complaint expressly alleges that the discontinuance of the South Louisville Roundhouse was an arbitrary violation of the point basis bargaining contract, and this deprived petitioners and those whom they represent, of seniority rights acquired over long periods of time, without any actual reduction in forces. The Amended Complaint states this laying off of the petitioners and those whom they represent, was a planned discrimination, directly contrary to the agreements, and in fraud of the rights of petitioners and their fellow employees.

Petitioners state the change in use of rosters was without notice or opportunity to appear or to protest, and their supposed representatives acceded; that this constituted discriminatory action by the unions toward employees on the Roundhouse rosters. This pleading states that they appealed to the Adjustment Board, but the Unions did not help them. They actually opposed them.

The Amended Complaint recites the fact that the Railroad Adjustment Board heard a question as to closing a point and as to dovetailing, with a decision against dovetailing and a plain failure to decide the other point. The Amended Complaint states that the result of the actions of the Railroad Company, of the Unions and of the Adjustment Board has been a failure to provide them with a valid legal determination of their rights, or even a hearing, and that if the Railway Labor Act provides no hearing in Court on protection of property rights, the Act itself is unconstitutional.

The Complaint, in Equity asks for a declaration of rights under the contracts. The Amended Complaint asks that the rights of the Roundhouse employees be protected.

The confusion comes into this situation from both acts and claims of the carrier and the Unions. Some are even mysterious.

Mystery No. 1.

Why did the carrier change its method of compliance with no change in bargaining agreements, by laying off men with point seniority, and continuing the same work at the same geographical locations by using rosters for other points?

Mystery No. 2.

Why did the carrier merely notify the bargaining agents, not any of the employees to be laid off and replaced?

Mystery No. 3.

Why did the Unions fail to represent the employees on the Roundhouse rosters?

Mystery No. 4.

Why did the officials of the Unions not report the proposed changes to the employees to be replaced?

Mystery No. 5.

Why did the carrier claim to be making a force reduction, with the same jobs offered to employees on other rosters before the lay-offs took place?

Mystery No. 6.

Why did not the carrier comply with the agreements by restoring jobs in the Roundhouse area according to seniority at that point?

Mystery No. 7.

Why did the carrier refuse to work out fair treatment to all by dovetailing the names on the rosters?

Mystery No. 8.

Since the Roundhouse seniority rosters have not been used since February, 1957, and the former Roundhouse area is all used for work by employees from other rosters, why does the carrier continue each year to make up said rosters?

Mystery No. 9.

How can the Carrier allot jobs in a geographical area, designated by contract as "South Louisville Roundhouse" to employees whose seniority rights are on the "South Louisville Shops", when the contracts provide that their seniority "shall be confined to the point employed"?

Mystery No. 10.

If these facts do not constitute definite planned intentional discrimination, through contract violations and deprivation of property rights acquired by contract, what else would be necessary?

Another statement made by respondent Railroad Company's counsel attempted to answer the mystery as to continuance of the posting of Roundhouse rosters when the area is now served by employees from other rosters. The statement is in effect a quote from the affidavit of W. S. Scholl (R. 45-46):

> "Affiant further states that although all mechanical operations formerly performed in the South Louisville Roundhouse have been discontinued, seniority rosters are now and will continue to be maintained covering all employees working at said point and in which each of them now and will continue to maintain their seniority standing established at the time of the discontinuance of said mechanical operations. In the event that mechanical operations should at some time in the future be re-established at the South Louisville Roundhouse, the same employees will be given priority to the work to be performed there and with the seniority they had established before such operations were discontinued on or about February 17, 1957."

With his affidavit Mr. Scholl filed a copy of the report of National Railroad Adjustment Board proceeding (Exh. "A", R. 48). This report lists the names of petitioners and the other Roundhouse em-

ployees performing work on specific jobs prior to February 18, 1957 and the names of the employees who took over their respective jobs on February 18, 1957. This is an important fact, because respondents counsel have never conceded in briefs that the old Roundhouse area has been added to the South Louisville Shops area.

The above quotation manifests that the respondent Railroad Company considers the bargaining agreement as variable in accordance with its particular plans. Having agreed upon point seniority rights for its employees, the Carrier takes the position that it can lay off employees, then change point boundaries at will. When it laid off all the employees on the Roundhouse rosters, it only took away the seniority rights of 66 employees. If it decides to reopen the Roundhouse area, by reversing the process, it will interfere with seniority rights in a shop with more than 15 times as many employees.

This reversal of action should take place, but not by arbitrary, one-sided action of the employer; but by a Court decision that such arbitrary action in February, 1957 was illegal, and it still is. This can only come by this Court sustaining the petition for certiorari, and then deciding whether or not these 66 loyal employees are entitled to their "day in court".

REAL ISSUES IN THIS ACTION.

No indication has at any time been given as to why the Railroad Company decided to discontinue the use of the Roundhouse rosters. Its counsel have consistently stated in their briefs that mechanical operations at the Roundhouse shop were discontinued. The complaint and amended complaint in this case make perfectly clear that petitioners are claiming no seniority rights in the area described in the bargaining agreements as the South Louisville Shops, only in the prior Roundhouse area.

Their claims of contract violations are based on respondent Railroad Company, on February 18, 1957, and on each day since then, replacing the laid off Roundhouse employees with employees from other rosters on the jobs which were then, and are now, located in the geographical area designated in the collective baragining agreements as South Louisville Roundhouse. If there is an issue of fact here, petitioners are entitled to a hearing on the facts.

This is particularly true where the contract gave petitioners seniority rights for some 14 or more years, then was claimed by the Carrier to protect them no longer.

This Court's decision in Brotherhood of Locomotives v. B. & O. Railroad Company, 372 U. S. 284, 83 S. Ct. 691, 9 L. Ed. 2d 759, decided March 4, 1963, expressly points out that issues exist between employees and carriers for which the Railway Labor Act furnishes no remedy.

The secret conference held in January, 1957 was arranged because the two collective bargaining agreements specifically protected point seniority rights. Respondent Railroad Company did not procure any contract change as to the effect of combining two "point" shop areas. It took sole responsibility for action in laying off employees, then replacing them immediately with employees from other rosters. This action was in effect what was attempted in the case of Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283, in trying to replace the train porters with brakemen, without any contract with the porters.

In that case the discrimination was against a separate craft. In this case the discrimination is against the employees on rosters for shops west of the division fence. Discrimination exists in just as invidious or arbitrary form even when not based on race or creed. That Opinion says in part (p. 775) that "the District Court is left free to consider what provisions are necessary to afford these employees full protection from further discriminatory practices of the Brotherhood". This observation arises from a discussion by this Court of principles enforced in the cases of Steele v. L. & N. R.R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Graham, et al v. B. of L. F. & E., 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The opinion in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 contains a very extensive and enlightening discussion of the jurisdiction of the National Railroad Adjustment

Board. That case really involved the question of the right of the Union to represent an employee before the Adjustment Board without his express consent. But, in the reasoning the opinion deals with the purposes of the Railway Labor Act, and holds that major controversies are not within the jurisdiction of this Board.

That Opinion recognizes that controversies arising over the formation or changing of collective bargaining agreements are not the minor disputes within the Board's jurisdiction. The opinion says (p. 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

In this case no change in the contract was made, but the Carrier attempted to make such a change on its own. That is what was attempted by the Carrier and the Union in the case of Steele v. L. & N. R.R. Co., cited *supra*, without the knowledge of the colored foremen. The Steele opinion says (pp. 203-4):

> "[14, 15] The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative

> is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted."

Since the contract was not changed in January, 1957, and the Carrier decided to proceed directly in violation of the contract provisions as recognized by all parties up to that time, there was a legal issue requiring a duly constituted tribunal. Neither party sought the use of the National Mediation Board. The 66 employees desired to continue in the service of the Carrier, so did not threaten a strike over this attempted unilateral change in the bargaining agreement.

Instead these loyal employees pursued pacific means, through administrative methods to procure relief. The Carrier denied this. In further effort to effect a practical solution, the 66 employees suggested an eminently fair proposal. The Carrier had opened up the jobs in the Roundhouse area to employees on the South Louisville Shops rosters. This was contrary to the specific provisions limiting job rights to point seniority, but the representatives of the Roundhouse employees suggested that the privileges which the Carrier had wrongfully granted to the Shops employees be extended to the employees in those crafts on both sets of seniority rosters.

This was refused by the Company. The 66 laid off men took their suggestion to the National Railroad Adjustment Board. This Board, recognizing that the Unions, as bargaining agents, had not opposed the at-

tempted unilateral change in the contract, did not try to adjust matters. It made a strict ruling as to no provision for dovetailing.

The other question (a) asked whether under the agreements, "the Carrier can deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?"

This was the exact issue which the respondent Carrier had brought on. It related to seniority rights in the territory or point described in the bargaining agreements as South Louisville Roundhouse. This applied to operation for the future—in 1957 and in 1963. It is still an unsolved legal issue. Petitioners have rights for breach of contract. But their rights as to future operation are more important and more controlling. The 66 men on the Roundhouse rosters faced discrimination—definitely planned secretly and openly and flagrantly carried out.

The discrimination against the men for years working west of the division fence was as hostile or invidious as any treatment planned or attempted on account of race or against train porters as a class. This discrimination arose in applying, rather than in negotiating a collective bargaining agreement. But this Court has definitely condemned such use of discrimination just as clearly and effectively. Conley, et al v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

PETITIONERS ENTITLED TO "DAY IN COURT".

There is no occasion to discuss the failure of the Adjustment Board to recognize the legal issues presented. This is a major controversy, and did not belong before that Board. As pointed out in the Steele case, cited *supra* (p. 204):

> "[17] Since the right asserted by petitioner 'is * * * claimed * * * under the Constitution' and a 'statute of the United States', the decision of the Alabama court adverse to that contention is reviewable here under § 237(b) of the Judicial Code, 28 U.S.C.A. § 344(b), unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration."

That decision was rendered before this Court had clarified the distinction between "major" and "minor" disputes. But this Court recognized in that opinion that a determination of future rights to jobs did not belong before the Adjustment Board. The Opinion says (pp. 206):

> "In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243. There is no adminis-

trative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining."

The right to a "day in court" was thus guaranteed to the aggrieved employees. The advantage of "a day in Court" was demonstrated by this Court's decision April 29, 1963 in affirming the Western District of Kentucky in the case of Brotherhood of Locomotive Engineers v. L. & N. R.R. Co., —— U. S. ——, 83 S. Ct. 1059, —— L. Ed. ——. That case involved a "minor" dispute and the employees threatened a strike. The District Court enjoined such action, and required the employee to follow procedure under the Act. The Union did get a determination as to rights under the Railway Labor Act.

In the instant action, petitioners were cut off the payrolls in a drastic manner. They used perfectly pacific methods, even displaying loyalty to their employer. At every turn, however, they have been met with dodging tactics. Even before the Adjustment Board, the most persuasive argument against them was the final statement in the position of the Carrier to the effect that:

"There is no dispute between carrier and System Federation No. 91, AFL, concerning petitioners involved in the roundhouse force reduction. *There is, therefore, no merit to the request of the petitioners and it should be denied.*" (Italics supplied)

Whether or not that was the controlling point with the Board is not important. This attitude of the carrier to prevent "a day in Court" has been per-

sistently followed by the carrier. It and the Unions, as bargaining agents have been successful in preventing any consideration of the merits of this case. Petitioners respectfully submit that this was a major controversy, which did not belong before the Adjustment Board, and that they are entitled to "a day in Court" as to the contract violations by the Carrier and the Unions, and the planned intentional discrimination against them. They are as much entitled to "a day in Court" as was the L. & N. in the Engineer's case decided last April.

Respectfully submitted,

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